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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

EMILIO GUTIERREZ et al., **Plaintiffs and Respondents,** **v.** **ODYSSEY LANDSCAPING COMPANY, INC., et al.,** **Defendants and Appellants.**	**A138158** **(Alameda County Super. Ct. No. VG-09-474707)**

Odyssey Landscaping Company, Inc. (Odyssey), appeals from a judgment issued after a bench trial awarding eight of its former employees[1] a total of $200,880.49 in unpaid wages, penalties and interest. We affirm.

BACKGROUND[2]

Plaintiffs' lawsuit alleged Odyssey failed to pay them the minimum wage required by California's prevailing wage law (Lab. Code, § 1720 et seq.).[3] The prevailing wage

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1 The former employees are Israel Osornio Peña, Francisco Javier Alvarado Olvera, Oscar Gonzalez, Emilio Gutierrez, Jesus Gutierrez, Jose Flores, Jose Lomeli, and Jesus Alejo (plaintiffs).

2 We state the facts in the light most favorable to the trial court's decision, resolving all conflicts and indulging all reasonable inferences to support the order. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 (*Bickel*), abrogated on another ground as stated in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100.)

law requires contractors on certain publicly-funded construction projects, called public works (§ 1720), to pay their workers "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed" (§ 1771). The Director of Industrial Relations determines the prevailing wage rate for each type, or classification, of work. (§ 1773.) The tasks performed by a worker, rather than his or her job title, determine the appropriate classification and the corresponding prevailing wage rate. Some tasks are covered by more than one classification; in such cases, a contractor may select any appropriate classification. However, if a worker performs tasks in a lower-paying classification which are only incidental to his or her work in a higher-paying classification, all of the work must be paid at the higher-paying classification's rate.[4]

Plaintiffs worked for Odyssey on various public works projects. Plaintiffs routinely signed timesheets with only their name and the number of hours filled in. An Odyssey foreman or manager later added to the timesheets a classification and/or the specific tasks performed. Odyssey classified most of plaintiffs' work as "landscape tradesman" work and paid plaintiffs the corresponding wage rate.

Plaintiffs claimed some work classified by Odyssey as landscape tradesman work was in fact covered by one of three classifications with substantially higher wage rates: "operating engineer," "cement mason," and "laborer." Plaintiffs testified about the work they performed for Odyssey. Eric Rood, an assistant chief at the Department of Industrial

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3 All undesignated section references are to the Labor Code.

Plaintiffs' complaint named several other defendants, none of whom are at issue in this appeal.

4 See State of California Department of Industrial Relations, Division of Labor Standards Enforcement, Public Works Manual (May 2009 ed.) <http://www.wbfaa.net/wp-content/uploads/2012/06/DAS-PUBLIC-WORKS-MANUAL-DLSE-0509.pdf> (as of Dec. 5, 2013).

Relations, Division of Labor Standards Enforcement, testified generally about some of the work covered by each relevant classification.[5]

In a detailed statement of decision, the trial court awarded plaintiffs unpaid wages, interest, and statutory penalties. This appeal followed.

DISCUSSION

I. *Plaintiffs' Initial Burden*

Odyssey contends the trial court's finding that plaintiffs satisfied their initial burden under *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721 (*Hernandez*), is not supported by substantial evidence. *Hernandez* provides the framework to analyze claims for unpaid work when an employer's records are incomplete. " '[W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a . . . difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation . . . . In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award

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[5] While testifying, Rood reviewed various documents issued by the Department of Industrial Relations, Division of Labor Statistics and Research, entitled "scope of work provision," setting forth in detail the work covered by some of the relevant classifications. The scope of work provision documents were included in Odyssey's exhibit binder at trial, but neither Odyssey nor plaintiffs moved them into evidence. Accordingly, we do not consider them as part of the record before the trial court.

damages to the employee, even though the result be only approximate.' " (*Id.* at p. 727, quoting *Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687-688.)

Odyssey challenges the trial court's findings that each plaintiff met his initial burden under *Hernandez* to (1) "prove[] that he has in fact performed work for which he was improperly compensated," and (2) "produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." (*Hernandez, supra,* 199 Cal.App.3d at p. 727.) The challenged findings are ones of fact which we must affirm if supported by substantial evidence, giving them " 'the benefit of every reasonable inference and resolving all conflicts in [their] favor.' " (*Bickel, supra,* 16 Cal.4th at p. 1053.)

A. *Improperly Compensated Work*

1. Operating Engineer Work

The trial court found E. Gutierrez, Alejo, and Peña performed work covered by the operating engineer classification.[6] These plaintiffs testified they operated excavators, Bobcats, skip loaders, backhoes, ride-on trenchers, and forklifts on Odyssey jobsites. They did not testify to the size, capacity, or horsepower of this machinery. Odyssey contends that, absent evidence about size, capacity, or horsepower, the trial court lacked sufficient information to determine that operating engineer was the appropriate classification for the work.

The only evidence in the record regarding size, capacity, and horsepower was Rood's testimony that certain classifications are divided into subclassifications with slightly different wage rates, and that these factors may determine the appropriate subclassification. Specifically, he testified a machine's size and capacity determine the applicable wage rate *within* the operating engineer classification. He further testified some classifications, including laborer and landscape tradesman, are "broken down by

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6 The trial court also found Flores and J. Gutierrez performed work covered by the operating engineer classification. However, Odyssey does not raise its operating engineer classification arguments with respect to these plaintiffs. Accordingly, we do not address them.

horsepower." This testimony does not demonstrate that a certain size, capacity, or horsepower threshold was necessary for plaintiffs' equipment operation to be covered by the operating engineer classification.

Moreover, Odyssey supervisors testified employees were eager to operate machinery such as Bobcats and excavators because they were able to earn a much higher wage rate doing so. A trier of fact could infer from this testimony that operation of the machinery present on Odyssey jobsites was covered by the operating engineer classification. Accordingly, substantial evidence supports the trial court's finding these plaintiffs performed operating engineer work.

Odyssey next argues it in fact classified and paid these plaintiffs as operating engineers for some hours, and they failed to provide evidence of the number of additional hours spent performing that work. The timesheets in evidence documented the number of hours Odyssey classified these plaintiffs as operating engineers. Each plaintiff provided some indication of the amount of time he spent operating machinery. E. Gutierrez testified to the approximate number of hours per day or per week he operated machinery on particular jobsites. Alejo testified he operated machinery the majority of the time on certain jobsites. Peña testified, on a particular jobsite, he operated machinery much more than 62.5 hours. This testimony is sufficient to allow the trial court to compare the operating engineer hours claimed by plaintiffs with those paid by Odyssey, and determine whether additional hours should have been classified as operating engineer work.

2. Cement Mason Work

The trial court found E. Gutierrez, Lomeli, Flores, and J. Gutierrez performed work properly classified as cement mason work. Odyssey argues the cement-related tasks these plaintiffs performed could be covered by either the landscape tradesman, laborer, or cement mason classifications.

Rood testified all three classifications can perform some kinds of cement work, but he also indicated limits on the cement work a landscape tradesman or laborer can perform. A landscape tradesman can "pour[] quick cements for maybe a fence post or what have you," and can perform some cement work in connection with decorative walls

and pools. In contrast, cement work in connection with "sidewalks, street[s], driveways" is cement mason work. Both the laborer and the cement mason can "fill material inside the forms and compact that fill material." The cement mason, and the laborer in some instances, can set forms. However, only the cement mason can perform screening, leveling, and finishing of concrete.

All of the plaintiffs as to whom Odyssey raises this challenge testified they screened, leveled, and/or finished concrete — work that, according to Rood's testimony, is exclusively cement mason work. These plaintiffs also testified to setting forms and compacting cement for sidewalks and similar items, cement projects that, according to Rood's testimony, could not be performed by a landscape tradesman. Although Rood testified setting forms and compacting concrete can in some instances be covered by the laborer classification, a trier of fact could infer from other evidence that plaintiffs' performance of this work should have been classified as cement mason work. First, Lomeli testified to being classified as a cement mason while performing the same work on a public works project for a different company. Second, Rood testified if a worker is performing tasks in a higher-paying classification, but in connection with that work performs incidental work covered by a lower-paying classification, all of the work should be covered by the higher-paying classification. The trial court could reasonably infer from this evidence that the plaintiffs' performance of compacting cement and form setting was cement mason work and/or incidental to cement mason work, and therefore that all of these tasks are properly classified as cement mason work.

3. Laborer Work

The trial court found Peña performed work properly classified as laborer work. Peña testified he laid cement and made frames for large concrete cabinets to house irrigation controls; he did not testify to performing any screening, leveling, or finishing work. Odyssey argues these tasks could have been classified as landscape tradesman, laborer, or cement mason work.

Rood's testimony was only the cement mason, or in some instances the laborer, could make concrete forms; the trial court could thus reasonably infer that the form

setting work was not properly classified as landscape tradesman work. In addition, Peña testified he believed his work was covered by the laborer classification because he had been paid a higher wage rate for performing the same work on a public works project for a different company. From this evidence, the trial court could infer that the tasks were properly classified as laborer work.

4. Properly Classified Work

Odyssey claims the trial court found Gonzalez and Olvera were not misclassified by Odyssey, but were otherwise underpaid for the work they performed. The trial court's statement of decision does not state whether the unpaid wages awarded to these plaintiffs result from misclassification or the failure to pay the full prevailing wage rate for the assigned classification. Respondent does not contest Odyssey's characterization of the trial court's finding as to these plaintiffs, and we assume it to be accurate.

Odyssey argues these plaintiffs failed to meet their initial burden under *Hernandez* because the only underpayment to which they testified was misclassification. Plaintiffs' lawsuit was not limited to underpayments resulting from misclassification. These plaintiffs submitted Odyssey's records of their hours and classifications, which the trial court apparently determined were accurate, as well as evidence of the wage rate they received and the proper prevailing wage rate for those classifications. Accordingly, these plaintiffs were able to prove with certainty the amount they were underpaid — an amount Odyssey does not contest on appeal. The *Hernandez* burden-shifting framework only applies when a plaintiff is unable to prove with certainty the amount of wages he or she is owed. It therefore does not apply to these plaintiffs, and Odyssey's challenge is without merit.

B. *Amount and Extent of Damages*

Odyssey next argues, as to the plaintiffs the trial court found had been misclassified, the trial court's finding that they provided " 'sufficient evidence to show the amount and extent of that [misclassified] work as a matter of just and reasonable inference' " (*Hernandez, supra,* 199 Cal.App.3d at p. 727) was not supported by substantial evidence.

Plaintiffs' proof as to the amount and extent of unpaid work need only be " 'approximate.' " (*Hernandez, supra*, 199 Cal.App.3d at p. 727.) *Hernandez* involved a claim for unpaid overtime. Time cards maintained by the employer for the relevant period had admittedly been falsified, and the trial court found the employee's after-the-fact estimate of hours worked was not believable. (*Id.* at pp. 724-725.) The trial court entered judgment for the employer, contending that any damages calculation would thus be "guesswork." (*Id.* at pp. 727-728.) The Court of Appeal reversed, instructing, "where the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages. [Citations.]" (*Id.* at p. 727.) Thus, "[i]t is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information. [Citations.]" (*Id.* at p. 728.)

Plaintiffs did not dispute the total number of hours appearing on their timecards; they disputed only whether these hours were properly classified. The timecards provided the total number of hours worked by each plaintiff on each jobsite. Each plaintiff provided some indication of the amount of time spent performing the disputed tasks. In some cases, the testimony indicated most or all hours spent on a particular jobsite involved tasks covered by the operating engineer, cement mason, or laborer classifications. In other cases, testimony approximated the number of days or hours per day on a particular jobsite performing such work. This testimony is sufficient to enable the trial court to reasonably infer the amount and extent of the underpaid work.

II. *Section 203 Penalties and Liquidated Damages*

The trial court awarded penalties pursuant to section 203. Penalties are properly awarded pursuant to section 203 if an employer "willfully fails to pay" wages of an employee who is discharged or quits. (§ 203, subd. (a).) "The term 'willful' within the meaning of section 203, means the employer 'intentionally failed or refused to perform an act which was required to be done.' [Citations.] It does not mean that the employer's refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud

workers of wages which the employer knows to be due. [Citations.]" (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 781 (*Road Sprinkler Fitters*).) A "reasonable good faith legal mistake" may negate a finding of willfulness. (*Id.* at pp. 782-783.) A trial court's finding of willfulness under section 203 is reviewed for substantial evidence. (*Road Sprinkler Fitters*, at p. 781.)

The trial court also awarded liquidated damages pursuant to section 1194.2. That section provides for liquidated damages where an employer has failed to pay the minimum wage. (§ 1194.2, subd. (a).) If the employer demonstrates it acted in reasonable good faith, the court may, in its discretion, reduce or refuse the liquidated damages. (§ 1194.2, subd. (b).)

Odyssey argues the trial court's finding Odyssey's failure to pay wages was willful and not in good faith is not supported by substantial evidence. Odyssey points to the uncontradicted testimony of its president that he believed Odyssey paid plaintiffs correctly. But "the trial court is not bound by uncontradicted evidence. [Citation.] Moreover, where uncontradicted testimony has been rejected by the trial court, it 'cannot be credited on appeal unless, in view of the whole record, it is clear, positive, and of such a nature that it cannot rationally be disbelieved.' [Citation.]" (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717.) Such is not the case here. Indeed, from Odyssey's practice of completing timecards after its employees signed them, the trial court could permissibly infer that Odyssey purposefully intended to misclassify work at lower-paying classifications.

Odyssey also argues the proper classification for a specific task is not always clear. The testimony at trial established, as to certain tasks, landscape tradesman was clearly not the proper classification. Moreover, the evidence showed Odyssey properly classified some operating engineer work; the fact that it failed to properly classify other identical such work does not indicate a reasonable misunderstanding. (See *Road Sprinkler Fitters, supra,* 102 Cal.App.4th at pp. 782-783 [affirming section 203 penalties where trial court found employer's error in classifying employee's work for prevailing wage purposes was "clear"].)

The trial court's findings, Odyssey's underpayments were willful and Odyssey did not act in reasonable good faith, were supported by substantial evidence.

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.